

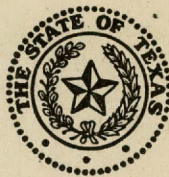
MONTHLY REPORT
OF THE
ATTORNEY GENERAL.
OF THE
STATE OF TEXAS

OPINIONS RENDERED

NOVEMBER 1, 1946

To

NOVEMBER 30, 1946



GROVER SELLERS
ATTORNEY GENERAL

0-6835 To: Bayne Satterfield, Commissioner, Office of Firemen's Pension Commission
Date: November 1, 1946
Wroe

A fireman who completed twenty years of service, after going into the armed forces, and before reaching the age of fifty-five years, is eligible to be granted a Service Certificate as provided under Article 6243e, Secs. 6, 21, V. A. C. S. Acts 1945, 49th Leg., Ch. 40, Sec. 1, p. 58; Opinions 0-4625, 0-6583.

0-6983 To: State Board of Education
Date: November 14, 1946
Goldberg

The Board of Education would be without authority to exchange the bonds of the Cisco Independent School District for refunding bonds bearing a lower rate of interest. Art. III, Sec. 55, Art. VII, Sec. 4, Constitution of Texas; Arts. 2669, 2789, 5070, V. A. C. S.; *Rhoads Drilling Co. v. Allred*, 70 S. W. (2d) 576; *New Nueces Hotel Co. v. Weil Bros.*, 243 S. W. 733; Opinion 0-4824, 0-4850.

0-7232 To: L. S. Johnson, Commissioner, State Department of Banking
Date: November 1, 1946
Speer

A loan and brokerage company which has not sold in Texas its bonds, notes, certificates, debentures, or other obligations, and does not offer any of these for sale in Texas, is not subject to examination by the Banking Commissioner. Art. 1524a, V. A. C. S.; Opinion 0-6947.

0-7269 To: Bascom Giles, General Land Office
Date: November 8, 1946
Watts

The Commissioner of the General Land Office is authorized under the existing statutes to accept the extension contract as a new lease and file as such, under the facts under consideration. Arts. 5367, 5368, V. A. C. S.; *Lewis v. Oates*, 195 S. W. (2d) 123; *Empire Gas and Fuel Co. v. State*, 47 S. W. (2d) 265-272; *Lamar v. Garner*, 50 S. W. (2d) 773; *State v. Magnolia*, 173 S. W. (2d) 186.

0-7303 To: Leroy L. Moore, County Attorney, Houston
County
Date: November 2, 1946
Sandlin

A delinquent tax payer in a suit against him for school district taxes may, by affirmative pleading, avail himself of the defense of the ten year limitation statute. Art. 7298, V. A. C. S.; *Sam Bassett Lumber Co. v. City of Houston*, 194 S. W. (2d) 114. Opinions 0-3315, 0-4495, 0-6194, 0-6558.

0-7311 To: Bascom Giles, Commissioner, General Land Office
Date: November 15, 1946
Kendall

The Commissioners' Court of Colorado County as officials of Colorado County Flood Control District cannot legally pay the expenses incident to organization of a levee improvement district in said county, out of state ad valorem taxes remitted to said district. Art. III, Secs. 25, 39, Constitution of Texas; Acts 1941, 47th Leg., Chap. 361; Acts 1945, 49th Leg., Chap. 364; *M. K. T. Ry. Co. v. McClamory*, 92 Tex. 150, 41 S. W. 466; *Halbert v. San Saba Land and Live Stock Co.*, 89 Tex. 230. (See opinion for citation of additional authorities.) Overrules 0-7058 insofar as they conflict.

0-7342 To: I. B. Hand, Criminal District Attorney, Parker
County
Date: November 8, 1946
King

A constable is not allowed an arrest fee in cases where the arrest is made by state officers and the constable does not participate in the arrest. Art. 1065, V. A. C. C. P.; Opinions 0-106, 0-2788.

0-7343 To: Pat R. Babo, County Attorney, Bailey County
Date: November 1, 1946
Sparks

The Commissioners' Court cannot deposit money derived from the sale of road bonds with a depository without the bond or security deposits; nor can it invest the money in United States obligations unless the bonds were sold prior to April 12, 1943. Acts 1933, 43rd Leg., Ch. 66; Arts. 708b, 752j, 2544, 2547, 2548, 2550, 2556, V. A. C. S.; Opinion 0-7393.

0-7364 To: Claude Isbell, Secretary of State
Date: November 1, 1946
King

This opinion concerns the registration of a particular design with the Secretary of State as the trademark of Liebmann Breweries, Inc. under Art. 851, V. A. C. S. *Layton Pure Food Co. v. Church & Dwight Co.* (C. C. A.) 182 F. 24, 29; *Bass, Ratcliff & Gretton v. Christian Feigenspan*, 96 F. 206, 212; *Hygienic Products Co. v. Coe*, 85 F. (2d) 264; *Marshall Mfg. Co. v. Verhalen*, 163 S. W. (2d) 665; Opinion 0-6774.

0-7380 To: T. E. Knight, County Attorney, Stonewall
County
Date: November 8, 1946
Blanton

The City of Aspermont may, under Article 7880-135, V. A. C. S., create a water district wholly within its boundaries for the purpose of digging wells, pools, or tanks wholly outside the city limits and piping water into the city for domestic and commercial purposes. Art. XVI, Sec. 59, Constitution of Texas; Arts. 7880-7899, V. A. C. S.; *Bale v. Merriman*, 245, S. W. 1012.

0-7387 To: T. O. Booth, Livestock Sanitary Commission of
Texas
Date: November 18, 1946
Kendall

State liability for destruction of animals infected with tuberculosis arises in year the animal is actually slaughtered rather than the year of its condemnation to be slaughtered under Sec. 22 of Art. 1525 (b) V. A. P. C. In consequence, the date on which the animal is destroyed, rather than the time of its condemnation to be slaughtered, determines the appropriation from which the indemnity is to be paid. Acts 1945, 49th Leg., Ch. 378, Item 22, p. 894.

0-7398 To: Arthur B. Knickerbocker, Adjutant General of
Texas
Date: November 15, 1946
Watts

This opinion concerns the right of the Texas National Guard Armory Board on behalf of the State of Texas to enter into lease rental contracts with the Federal Government for facilities such as Eagle Mountain Base, located near Fort Worth, Texas, and related questions with regard to sub-renting to a

private corporation and to National Guard Units. Arts. 4890b, 5790b, 5890b, V. A. C. S.; *Texas National Guard Armory Board v. McCraw*, 126 S. W. (2d) 627; *Fort Worth Cavalry Club. v. Sheppard*, 83 S. W. (2d) 660; Opinion 0-5505.

0-7400 To: G. C. Jackson, County Attorney, Zavala County
Date: November 1, 1946
Sparks

Under the terms of Art. 7622b, V. A. C. S., if a water improvement district has outstanding indebtedness and desires to annex additional acreage, the proposition to be voted on includes not only the annexation but also the assumption of indebtedness. If the election results favorably for the annexation, then both the annexed portion and the territory within the boundaries of the original district assume their proportionate part of the indebtedness.

A statute, like Art. 7649, V. A. C. S.; which provides for the additional of territory to a water improvement district without an election, raises serious constitutional questions. For that reason it is strongly suggested that the addition of any territory be made in accordance with the provisions of Article 7622b, V. A. C. S.; Art. III, Sec. 52, Art. XVI, Sec. 59, Constitution of Texas; Acts 1941, 47th Leg., Ch. 403, p. 661; *Crabb v. Celeste Independent School District*, 146 S. W. 528.

0-7411-A To: Jean Day, County Attorney, Henderson County
Date: November 9, 1946
Davis and Reeves

Where the Commissioners' Court passes an order raising the salaries of county officials twenty-five per cent (25%) and the salaries of the deputies and employees ten per cent (10%), and the order is supported by a finding of the Commissioners' Court that the financial condition of the county and the needs of the officers justify the increase in compensation, then the county auditor is authorized to allow the proposed raises in salary. Opinion 0-7411.

0-7413 To: W. L. Edwards, County Attorney, Victoria
County
Date: November 22, 1946
Wroe

The 3-foot and 4-foot extension, front and rear, respectively, in addition to the 45-foot limit on combinations of vehicles, making an overall length of combined vehicles and load of 52 feet, is allowed without requiring a special permit under Art. 827a, Sec. 3, pars. (c) and (d) V. A. P. C.

A permit to move superheavy or oversize loads over state highways, issued by the State Highway Department, specifying as load "Range Csg., Drill and Poles" and reciting a maximum length of 65 feet, authorizes the use of a combination of vehicles in excess of 45 feet while hauling the load specified in the permit, so long as neither the vehicle, nor the vehicle and load, exceed the maximum length specified in the permit.

Such a combination of vehicles exceeding 45 feet in length may be operated empty on public highways to and from their home base, or with such loads as the particular permit issued therefor specifies. Art. 827a, Sec. 2, V. A. P. C.; Art. 6701a, Sec. 1, V. A. C. S.; Opinions 0-1280, 0-3692.

0-7424 To: Dave McNeill, Jr., County Attorney, Shelby County

Date: November 1, 1946

Speer

A county official, such as the district clerk or the county clerk, can appoint as his assistant, a person whose deceased wife was the aunt of the clerk's present wife, or the half aunt since she was a half-sister to the clerk's wife's father. The official and his appointee are not related within the second degree by affinity or within the third degree by consanguinity. Art. 432, V. A. P. C.; Opinion 0-2225 is overruled; Opinion Nos. 0-119, 0-784, and 0-1095 are restored.

0-7430 To: F. T. Graham, County Attorney, Cameron County
November 20, 1946
Knorpp and Reeves

Since Art. 7336f, V. A. C. S., does not provide any specific method for the county tax collector to follow in letting the contract to compile the delinquent tax rolls, the obtaining of a number of bids without publicly advertising for bids is sufficient compliance with the statute. Opinions 0-3942, 0-4644, 0-4991, and 0-5780.

0-7438 To: M. E. Gates, County Attorney, Walker County
Date: Nov. 20, 1946
Knorpp and Reeves

This opinion concerns the construction of Acts 1945, 49th Leg., H. B. No. 84, p. 280, which deals with the authority of county commissioners' court to fix salaries of county commissioners and the payment of their actual traveling expenses incurred while traveling outside the county on official business. Arts. 2350, 2350(7), V. A. C. S.; 39 Tex. Jur., Sec. 79, p. 147; 34 Tex. Jur., Sec. 107, p. 511.

0-7442 To: E. L. Hinson, Jr., County Auditor, Polk County
Date: November 13, 1946
Henley

The County Commissioner of one precinct may not continue to spend money for labor and material after his budget has been exhausted, even though other precincts in the same county have balances in their budget and there is a surplus over the budget in the Road and Bridge Fund, unless such expenditures are classified as emergency expenditures and come within the statutory exception which permits the commissioners' court to amend the original budget. Art. 689a, V. A. C. S.; Opinion 0-2937.

0-7444 To: H. Bayne Satterfield, Commissioner, Firemen's
Pension Commission
Date: November 1, 1946
Speer

This opinion is a clarification of Opinions 0-6583 and 0-7082. The widow of a fireman, who was fifty-four years of age, had served twenty-two years and three months in a Texas Fire Department and who died of a heart attack on May 20, 1942, which was not in consequence of the performance of his duty, is not entitled to a pension. This amendment to Art. 6243e, Sec. 6, V. A. C. S., became effective September, 1945, and is not retroactive as to a deceased member of the fire department. Art. 6243e, Secs. 6, 12, 14, V. A. C. S.; Opinions 0-6521, 0-6583, 0-7082.

0-7449 To: D. W. Stakes, Manager, Texas Prison System
Date: November 15, 1946
Stapp

It is not a criminal act for an employee of a State Hospital for the Insane to release illegally a convict, but the superintendent of the State Hospital, with the consent of the Board of Control, may remove an employee for good cause.

Since the employee lacks the authority to make the release, the convict is an escaped convict, therefore, when he is recaptured, he should be redelivered to the hospital. If the judgment of his insanity has been or hereafter shall be legally set aside, then the convict should be returned to the penitentiary to serve that part of his unexpired sentence, computed as of the date he was adjudged insane. Art. 3, V. A. P. C.; Art. 928, V. A. C. C. P.; Arts. 3176, Sec. 3, 3186a, V. A. C. S. (See opinion for additional citations.)

0-7454 To: C. H. Cavness, State Auditor
Date: November 6, 1946
Speer

Furnishing a convict released on conditional pardon with transportation "to the county seat of the county to which he has been paroled" is in violation of Art. 6203, Sec. 10, V. A. C. S., which requires that the ticket furnished be "from the place of his discharge to the place of his conviction and sentence."

Such clothing as is voluntarily surrendered or discarded by incoming convicts may be given to prisoners released on reprieve. Arts. 6166zi, 6196 (repealed), 6203, Sec. 10, V. A. C. S.; Opinion 0-1850.

0-7457 To: H. D. Dodgen, Executive Secretary, Game, Fish
& Oyster Commission
Date: November 26, 1946
Allen

The Game, Fish and Oyster Commission of Texas has the right and authority to refuse to issue either a Non-resident Commercial Fisherman's License, or a Non-resident Commercial Fishing Boat License, or both, to a resident of Louisiana when application is made therefor and the required fee offered in payment. Acts 1939, 46th Leg., p. 238; Acts 1945, 49th Leg., Ch. 55, p. 78; Art. 934b-1, Secs. 3, 4, 5, 6, V. A. P. C.

0-7465 To: H. Pat Edwards, Civil District Attorney, Dallas
County
Date: November 8, 1946
Sparks

A county does not have the legal right to acquire property in an incorporated city or town for state highway purposes by condemnation, but it may purchase such lands for this purpose if the city or town consents.

The proceeds of road bonds issued for such purpose may be used to purchase such right-of-ways. If it is specified in the pre-election order that the proceeds will be spent only on certain named highways, then the proceeds may be spent on no other highways.

The county has no power or authority with respect to city streets which are not part of the county road or state highway system. Arts. 1016, 1086, 1201, 1202, 6703, 6674q-4, V. A. C. S.; Art. 2351, Subd. 6, V. A. C. S.; *State v. Jones*, 18 Tex. 874; Opinion 0-1190. (See opinion for additional authorities.)

0-7472 To: Miss Pauline Kibbe, Executive Secretary, Good Neighbor Commission of Texas
Date: November 1, 1946
Barcus

Since the Legislature appropriated expense money for the Executive Secretary of the Good Neighbor Commission of Texas and did not appropriate any for the expenses of the stenographer, the latter would not be entitled to payment for expenses incurred while attending meetings outside of Austin. Acts 1945, 49th Leg., H. B. 804, p. 133.

0-7474 To: C. Simmons, County Auditor, Henderson County
Date: November 8, 1946
Henley

The commissioners' court may employ counsel and compensate him from the general fund when the matters involved concern the county as a whole, where the regularly constituted public officials could not or would not act, or where public interest is so great as to warrant extra-legal services; but the commissioners' court shall not employ counsel on a salary basis to advise and represent it in whatever matters might arise. Art. 334, V. A. C. S.; *City National Bank v. Presidio County*, 26 S. W. 775; *Galveston County v. Gresham*, 220 S. W. 560; Opinions 0-4955, 0-1372.

0-7475 To: John H. Winters, Executive Director, State Department of Public Welfare
Date: November 1, 1946
Speer

An amendment to the Constitution is not necessary in order for the State of Texas or the Department of Public Welfare to accept money from the Federal Government for a foster home care program. Consent of the State to accept such donations or grants may be given by the Legislature in an appropriation act or by a resolution. Acts 1945, General Provisions, Appropriation Act for State Departments, Sec. 2, Subd. (9); Opinion 0-5136.

0-7477 To: Bert Ford, Administrator, Texas Liquor Control Board
Date: November 15, 1946
Stapp

Where an applicant seeks a package store permit for a location less than 300 feet from the entrance of a building used by

a mission, the question is not one of measurement but is rather a question as to whether or not the building in which the mission chapel is located is used principally for religious worship. *Stubbs v. Texas Liquor Control Board*, 166 S. W. (2d) 178; 30 Amer. Jur. 437.

0-7478 To: Shelly K. Long, County Attorney, Jefferson
County
Date: November 26, 1946
Henley

The county commissioners' court has the power to employ an engineering firm to perform special engineering work in connection with a county road improvement program. Art. V, Sec. 18, Constitution of Texas; Arts. 689a-11, 2351, 2368a, 6740, V. A. C. S.; *Bitulithic Co. v. Nueces County*, 11 S. W. (2d) 305. (See opinion for additional citations.)

0-7479 To: Claude Isbell, Secretary of State
Date: November 29, 1946
King

A non-profit educational foreign corporation is not required to secure a permit to do business in Texas, and the State Department of Education may contract with such corporation. However, under Art. 7074, Subd. 41, V. A. C. S., the corporation would be liable for occupation taxes. Art. 1529, V. A. C. S.; Opinion 0-5998.

0-7480 To: John T. Hutchison, County Attorney, Lamar
County
Date: November 18, 1946
Stapp

The punishment for the possession of illicit unstamped beer is controlled by Art. 666-41, V. A. P. C., and punishment for possession of illicit unstamped distilled spirits, liquor, wine and vinous liquors, and malt liquor containing alcohol in excess of four per cent by weight is controlled by Art. 666-21, V. A. P. C. *McChristy v. State*, 134 S. W. (2d) 295, reversed on other grounds in 145 S. W. (2d) 872. (See opinion for additional citations.)

0-7481 To: D. C. Greer, State Highway Engineer
Date: November 18, 1946
Bergman

This opinion concerns the issuance of certificates of title in cases where the ownership of a motor vehicle has been trans-

ferred by operation of law, particularly upon inheritance, devise or bequest. Art. 1436-1, Secs. 1, 27, 28, 29, 33, 35, 38 and 53, V. A. P. C.; Arts. 3290, 3661, 4102, V. A. C. S. (See opinion for additional citations.)

0-7482 To: D. K. Woodward, Jr., Chairman, Board of Regents, University of Texas
Date: November 6, 1946
Ollison

According to Art. VII, Sec. 14, Constitution of Texas, the Texas Legislature is without authority or power to levy or to cause to be levied a tax, or to appropriate money out of the General Revenue Fund for the erection of buildings for the University of Texas.

0-7483 To: Russell Graham, County Attorney, Kimble County
Date: November 8, 1946
Sparks

The commissioners' court may call an election to determine whether bonds will be issued for the purpose of acquiring tracts of land for an agricultural experiment station, and may lease the same to A. & M. College; however, this does not authorize the donation or sale of the property to the College. Art. 163a, V. A. C. S.

The Board of Directors of A. & M. College is without authority to establish a division or adjunct of the College in Kimble County, Texas, but it may lease an experiment station from Kimble County. Art. VII, Sec. 13, Constitution of Texas; Arts. 136, 137, 138, 143, 163a, 2607, V. A. C. S.; *State v. Morgan*, 170 S. W. 652; Opinion 0-2276.

0-7484 To: John R. Shook, Criminal District Attorney, Bexar County
Date: November 8, 1946
Blanton

This opinion concerns whether certain litigation pending in regard to Bexar County Road and Bridge Warrants is of such a nature as to support the county auditor in refusing to issue Bexar County Robert E. Green Hospital Time Warrants. Opinion 0-7054.

0-7488 To: J. F. Holubec, County Auditor, Lavaca County
Date: November 27, 1946
Ollison

A school district which is 13.6 square miles in area and has eighteen enumerated scholastics cannot qualify for State aid

under Acts 1945, 49th Leg., S. B. 167, Art. I, Sec. 1, clause (e) because it does not have "less than an average of one enumerated scholastic per square mile." The said Act does not contemplate the segregation of white and colored scholastic enumeration to determine the scholastic population of the district. Art. VIII, Sec. 7, Constitution of Texas; Acts 1945, 49th Leg., R. S., S. B. 167, Art. I, Sec. 1, clauses (a) to (f); Art. 2902, V. A. C. S.

0-7489 To: V. A. Collins, President, Board of Regents, State Teachers' Colleges of Texas
Date: November 26, 1946
Blanton

The President of West Texas State Teachers' College has no authority to dismiss employees of that institution for any reason. However, the Board of Regents of the State Teachers' Colleges does have the power to discharge such employees, for cause, under the general rules of law relating to personal service contracts.

As to employees of State Teachers' Colleges dismissed for good cause, the State would be under no liability for their salary for whatever balance remained at the time of the employment was terminated. Art. 2647, Sec. 1, V. A. C. S.; Opinion 0-1735.

0-7491 To: Marion McGee, County Auditor, Hays County
Date: November 20, 1946
Knorpp

A high school teacher may also serve as a sheriff of a county without violating Art. XVI, Secs. 33 and 40, Constitution of Texas. *Kimbrough v. Barnett*, 55 S. W. 120; *Leymel v. Johnson*, 288 Pac. 858.

0-7499 To: Pauline Kibbe, Executive Secretary, Good Neighbor Commission of Texas
Date: November 22, 1946
Ollison

Aliens who are bona fide inhabitants of Texas and citizens of Mexico, a nation which has a common land boundary with the United States, may acquire and own any lands in the State of Texas, provided they file a Report of Alien Ownership in accordance with Art. 176, V. A. C. S.

The designation of the grantee in the contemplated conveyance as "Joel S. Quinones, Mexican Consul at San Antonio, or his successor in office, for the use and benefit of the Mexican people of Karnes County, Texas," would be legal and proper. Arts.

166, 167, 176, 7425a, V. A. C. S.; *Vineyard v. O'Connor*, 90 Tex. 59; *Sparks v. Humble Oil and Refining Company*, 129 S. W. (2d) 468.

0-7501 To: Clayton Bray, County Attorney, Sutton County
Date: November 22, 1946
Knorpp

A deputy county surveyor does not have to be licensed and may file his field notes in the General Land Office but with the requirement that they be certified to by the county surveyor. Arts. 5285, 5300, Sec. 9, V. A. C. S.

0-7503 To: Harry Bengé Crozier, Chairman, Texas Unemployment Compensation Commission
Date: November 20, 1946
Koch

Subsection 2(19) of the Departmental Appropriation Bill, Acts 1945, 49th Leg., does restrict the employment by the Texas Unemployment Compensation Commission of either the husband or the wife when the other spouse is employed by another department of the State Government of Texas. Opinion 0-6985.

0-7515 To: Ernest Guinn, County Attorney, El Paso County
Date: November 29, 1946
Knorpp

Acts 1933, 43rd Leg., R. S., §. B. 90, Ch. 9, p. 11, General Laws of Texas, providing for the creation of a county purchasing agent in counties of more than 100,000 and less than 150,000 population, is a local or special law violating the provisions of Article III, Sec. 56, of the Constitution of Texas, and is therefore unconstitutional and void. *County of Bexar v. Tynan*, 97 S. W. (2d) 467; Opinion 0-2221.

0-7516 To: N. P. Foster, County Auditor, Smith County
Date: November 27, 1946
Speer

The employment of a janitor by the commissioners' court of a county where the janitor's wife is a half-sister of one of the county commissioners violates the nepotism statutes. The fact that the janitor received his appointment and assumed his duties prior to the election of the commissioner to which he is related would not remove his position from the nepotism statutes. Art. 432, V. A. P. C.; Opinions 0-1408 and 0-6406.

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